No. 20550

United States Court of Appeals
for the Ninth Circuit

NATIONAL FARMERS UNION PROPERTY and CASUALTY COMPANY,

Appellant,

vs.

LAURENCE COLBRESE, JR.,

Appellee.

On Appeal from the United States District Court for the District of Montana.

Brief of Appellant

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B. *STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION.*

(a) Complaint (Tr., Vol. II, pp. 2-9) was filed in the District Court of the United States for the District of Montana, Billings Division, on September 25, 1963.

(b) The complaint alleges that the defendant National Farmers Union Property and Casualty Company is a capital stock corporation organized under the laws of the State of Utah, with its principal office in Denver, Colorado; plaintiff Laurence Colbrese, Jr., is a resident of the State of Montana. It is also alleged that the matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000 (Complaint, par. I, Tr., Vol. I, p. 2).

(c) The defendant appeared in the action and filed its answer to the plaintiff's complaint (Tr., Vol. I, pp. 10-14, inc.)

(d) Defendant in its answer admitted the jurisdictional allegations of diversity of citizenship and the jurisdictional amount (Answer, Second Defense, par. 3, Tr., Vol. I, p. 10).

(e) Under 28 U.S.C.A., Sec. 1332, the district courts have original jurisdiction of all civil actions where the matter in controversy exceeds the value of $10,000, exclusive of interest and costs and is between citizens of different states.

(f) A jury trial was had between the parties as to one issue of fact, and the jury returned its answer to a

Special Interrogatory with respect to that issue of fact (Tr., Vol. I, p. 34). The Court subsequently entered written Findings of Fact and Conclusions of Law with respect to the whole of the case (Tr., Vol. I, pp. 55-62). Thereafter the Court, on September 7, 1965, rendered final judgment and decree in favor of appellee in the sum of $18,862.88, with interest at 6% from October 16, 1962, and costs in the sum of $136.70 (Tr., Vol. I, p. 79).

(g) Thereafter appellant filed a written Notice of Appeal with the clerk of the district court on October 5, 1965 (Tr., Vol. I, p. 81), and a bond for costs on appeal in the sum of $500.00 (Tr. Vol. I, pp. 82-83). Said notice and bond were filed within thirty days of the judgment in accordance with Rule 73 of the Federal Rules of Civil Procedure.

(h) Also on October 5, 1965, appellant filed in the district court its written Statement of Points upon which it relied in this appeal (Tr., Vol. I, pp. 85-86) and its Designation of Record on Appeal (Tr., Vol. I, pp. 87-88), all as provided by Rule 75 of the Federal Rules of Civil Procedure.

(i) The appeal was filed in the United States Court of Appeals for the Ninth Circuit on November 15, 1965, and docketed on November 23, 1965.

(j) The jurisdiction of the said Court of Appeals depends upon Title 28, United States Codes, Section 1291, which provides that courts of appeal shall have

jurisdiction of appeals from all final decisions of the district courts of the United States; and upon Title 28, United States Codes, Section 2107, which provides that except as otherwise provided no appeal shall bring any judgment, order or decree before the court of appeals for review unless notice of appeal is filed within thirty days after the entry of such judgment, order or decree. The necessary steps were taken here to perfect the appeal.

(k) Original jurisdiction in the district court and the jurisdiction of this appellate court appear from the foregoing facts and the applicable statutes.

C. *STATEMENT OF THE CASE*

This appeal involves an incredible decision of the district court relating to the ownership of a 1949 Ford automobile that was involved in a fatal accident. The Ford was sold, or agreed to be sold, to Albert Kinney prior to September 2, 1958, by a Mrs. Robert McCormick.

Albert Kinney paid the full consideration for the Ford (Findings of Fact, Par. V, Tr., Vol. I, p. 56).

The only person who could claim adverse title to the Ford, Mrs. Robert McCormick, claims no title, and since September 2, 1958, thought that Albert Kinney was the owner of the Ford. (Request for Admissions, Par. 8, Tr., Vol. I, P. 16; admitted in Plaintiff's Answer to Request, Par. 3, Tr., Vol. I, P. 19.)

Albert Kinney took possession of the Ford, used it as his own for two years or more, and insured it as his own with appellant until September 3, 1960, when his insurance with appellant lapsed for non-payment of premium (Tr., Vol. I, p. 36).

Jerry Kinney, the 14-year-old son of Albert Kinney, and the driver involved in the fatal accident, used the Ford to hunt, to pick up companions, and to do farm chores (Tr. Vol. II, p. 35-40).

Nevertheless, the district court concluded that the Ford was a NON-OWNED AUTOMOBILE for Albert Kinney, and that it was NOT REGULARLY FURNISHED to Jerry Kinney at or prior to the fatal accident (Conclusions of Law, par. 2, Tr., Vol. I, p. 61).

The facts of the case, though somewhat involved, are fairly and concisely set forth in the Findings of Fact adopted by the court. The only real dispute between plaintiff and defendant is as to whether or not the Ford was "regularly furnished" to the driver at the time of the fatal accident, which was the subject of the jury trial and decision. We will set forth the essential facts here for the convenience of the court.

The 1949 Ford automobile was acquired by Albert Kinney when he purchased a farm and machinery and equipment thereon, including the Ford, from a Mrs. Robert McCormick prior to September 2, 1958, probably in the year 1957. The record owner of the farm and

the Ford was one C. W. Ehart, who had died prior to September 2, 1958, leaving as his sole heir one Robert McCormick. Upon Ehart's death McCormick became entitled to all of Ehart's right, title and interest in the Ford. Then Robert McCormick died, also prior to September 2, 1958, leaving as his sole heir Mrs. Robert McCormick, who thereupon became entitled to McCormick's right, title and interest in the Ford (Findings of Fact, Tr., Vol. I, p. 56, par. IV).

The Ehart estate is the subject of a probate proceedings in the appropriate district court in Yellowstone County, Montana. Certain of the probate papers are an exhibit in this case (Defendant's Ex. 12). Mrs. McCormick, as well as being the sole heir of the Ehart interest was also the administratrix of the Ehart estate on September 2, 1958, and prior thereto.

Prior to September 2, 1958, Mrs. McCormick agreed to sell all of her right, title and interest in the Ford to Albert Kinney for a consideration which has been fully paid. Since September 2, 1958, Kinney has been in possession of the Ford and has claimed to be its owner (Findings of Fact V, Tr., Vol. I, p. 56). Moreover, he thought himself to be the sole owner of all right, title and interest in the 1949 Ford (Defendant's Request for Admissions, par. 5, Tr., Vol. I, p. 16; admitted by plaintiff in Answer to Request for Admissions, par. 3, Tr., Vol. I, p. 19).

In addition, Mrs. Robert McCormick, from and since September 2, 1958, thought that Albert Kinney was the owner of all right, title and interest in and to the Ford (Defendant's Request for Admissions, par. 8, Tr., Vol. I, p. 16; admitted by plaintiff in Answer to Request for Admissions, par. 3, Tr., Vol. I, p. 19).

At the time of the transaction, Albert Kinney received the "Certificate of Registration and Tax Receipt" upon which licenses are issued in Montana, from Mrs. McCormick, and actually paid for the Montana licenses for the automobile for the years 1959 and 1960 (Findings of Fact, par. V, Tr., Vol. I, p. 56).

However, the "Certificate of Ownership" issued by the Registrar of Motor Vehicles of the State of Montana has not been delivered to Kinney by Mrs. McCormick or anyone else.

Albert Kinney requested of Thomas Bradley, Esq., the attorney representing Mrs. Robert McCormick in the transaction, and also representing the C. W. Ehart estate (Probate No. 10181 aforesaid) on four or five occasions for the title certificate of ownership to be issued to him; he made such request four or five times from the date of the transaction to December 3, 1960 (Defendant's Request for Admissions, par. 10, Tr., Vol. I, p. 17; admitted in Plaintiff's Answer to Request for Admissions, par. 3, Tr., Vol. I, p. 19).

On December 3, 1960, when Jerry Kinney, the minor

son of Albert Kinney was driving the Ford he ran off the highway on an icy stretch, upset, and thereby caused fatal injuries to the person of Duaine Colbrese, who was riding as a passenger in the Ford (Findings of Fact, No. III, Tr., Vol. I, p. 56). Laurence Colbrese, the appellee in this case, is the father of the deceased Duaine Colbrese.

At about the time that Albert Kinney acquired the Ford, he had procured a policy of insurance on it, from the defendant, covering the 1949 Ford and providing bodily injury liability and property damage coverages. Albert Kinney paid the defendant the insurance premiums due upon this policy for the years 1958 and 1959, but he allowed the policy to lapse for non-payment of premium on September 2, 1960. The said policy was lapsed and not in effect on the date of death of the minor, Duaine Colbrese, on December 3, 1960 (Findings of Fact No. XXV, Tr., Vol. I, p. 60).

At the time of the fatal accident, however, Albert Kinney had two other motor vehicles, one a 1951 Dodge passenger automobile, and the other, a 1954 International 1½ Ton Truck. Each of these vehicles were insured for bodily injury and property damage coverages with the appellant insurance company (Findings of Fact No. VI, VII, Tr., Vol. I, p. 57).

Thus, on the date of the fatal accident, December 3, 1960, Albert Kinney was the owner, or thought him-

self to be the owner of three vehicles, the Ford, the Dodge, and the International truck. Two of these were covered by insurance which Albert Kinney had procured, but the Ford was not covered by an insurance policy on it directly because Albert Kinney had let the insurance on that vehicle lapse.

Each of the insurance policies on the Dodge, and on the International Truck, contained the following provisions:

> "A. Bodily injury, sickness or disease, including death resulting therefrom, hereinafter called bodily injury, sustained by any person * * *
> arising out of the ownership, maintenance, or use of the owned automobile or any non-owned automobile * * *, and the company shall defend any suit alleging such bodily injury or property damage."

Other pertinent policy provisions were as follows:

> "The following are insureds under (liability):
> (a) With respect to the owned automobile,
> (1) the named insured and any resident of the same household;
> (2) any other person using such automobile providing the actual use thereof is with the permission of the named insured;
>
> (b) With respect to a non-owned automobile,
> (1) the named insured
> (2) any private relative, but only with respect to a private passenger automobile or trailer not regularly furnished for the use of such relative; * * *
> " 'Non-owned automobile' means an automobile or trailer not owned by the named

> insured or any relative, other than a temporary substitute automobile."
>
> (Findings of Fact, XIII, Tr., Vol. I, pp. 59, 60.)

From the foregoing quoted provisions of the insurance policies it is obvious, that since the 1949 Ford did not have insurance, the fatal accident in which it was involved would be covered by the other policies only if the 1949 Ford was a NON-OWNED AUTOMOBILE, and it was NOT REGULARLY FURNISHED for the use of Jerry Kinney, the driver at the time of the fatal accident.

Eventually suit was brought by the appellee, as father of the deceased Duaine Colbrese, against Jerry Kinney, the driver of the fatal Ford automobile. Kinney demanded that appellant appear and defend him in the suit. The appellant insurance company took the position that Albert Kinney owned this automobile, and that the automobile was regularly furnished to Jerry Kinney, and therefore declined to defend the suit or to admit coverage under the policies of the two other vehicles owned by Albert Kinney. A consent judgment was taken against Jerry Kinney and the judgment was satisfied upon assignment to the appellee of all rights of Jerry Kinney, to sue for and collect the indemnity from the appellant insurance company.

The District Court, incorrectly as we contend here, took the position that the title registration statutes in

Montana made the Ford automobile "non-owned" by Albert Kinney. The issue of whether the automobile was "regularly furnished" to Jerry Kinney was submitted to a jury for trial upon a special interrogatory. The jury returned its answer that it had not been regularly furnished to Jerry Kinney.

Judgment was entered against the appellant insurance company in the District Court and appellant appeals from that judgment here, principally upon the contention that it violates every tenet of common sense that under the facts here Albert Kinney was not the "owner" of the Ford automobile.

D. *SPECIFICATIONS OF ERROR*

Appellant specifies the following errors for consideration by the Circuit Court of Appeals:

1. It was error to deny appellant's Motions for Summary Judgment (Tr., Vol. I, p. 21; 45; Tr., Vol. II, p. 4).

2. It was error to enter judgment for appellee (Tr., Vol. I, p. 79).

3. The District Court erred in adopting its Conclusions of Law Nos. 2 and 3 as follows (Tr., Vol. I, p. 61):

> "2. The 1949 Ford automobile in which plaintiff's son was killed was, on December 3, 1960, a "non-owned automobile" under defendant's insurance policies referred to in paragraphs VI and VII of the Findings of Fact, and was not regularly fur-

nished for the use of Jerry Kinney by his relative, Albert Kinney."

"3. Jerry Kinney was entitled to representation and defense of the lawsuit and claim made against him by Laurence Colbrese, Jr., in the state court action, and by refusing to so defend and represent Jerry Kinney, defendant breached the insurance contracts mentioned in paragraphs VI and VII of the Findings of Fact."

for the reason that under the facts, and the law, Albert Kinney was in fact the owner of the automobile, and the automobile was not a "non-owned automobile" under the insurance policies aforesaid.

4. The Court erred in refusing to adopt appellant's suggested Conclusion of Law No. 2 as follows:

"2. On December 3, 1960, Albert Kinney was the owner of and entitled to possession of said 1949 Ford." (Tr., Vol. I, p. 53)

for the reason that under the facts and under the law said Kinney was the owner of said Ford.

5. The Court erred in failing to adopt appellant's suggested Conclusion of Law No. 3 as follows:

"3. Because the certificate of ownership (certificate of title) of the 1949 Ford was then in the C. W. Ehart estate, Sec. 53-109(d) does not apply." (Tr., Vol. I, p. 53)

for the reason that under the facts and under the law the said subsection of the statute was inapplicable.

E. *ARGUMENT OF THE CASE*

Summary of Argument:

Subsection (d) of Sec. 53-109, R.C.M. 1947, does not

apply here. Since the paper title to the Ford was vested in the C. W. Ehart estate, Mrs. Robert McCormick, the seller of the Ford, as sole heir and as administratrix of the estate, could proceed to transfer title to the Ford under the provisions of subsection (e) of said Sec. 53-109, R.C.M. 1947. The punitive provisions of subsection (d) do not apply to procedures under subsection (e).

In the construction of statutes, such application of particular statutes as will give effect to the legislative intent, and yet be compatible and workable with other applicable statutes, without adding to or taking from the statutes, should be the objective of the court.

In the construction of contracts of insurance, terms used should be construed in their popular and ordinary sense, rather than according to their strict legal meaning.

Albert Kinney was the "owner" of the Ford under the definition of "owner" in Sec. 53-133, R.C.M. 1947.

The Sonnek and Safeco cases are declarations of the Montana Supreme Court for rescinded contracts of purchase of automobiles. In this case the contract of purchase is still fully in effect.

Therefore, even if subsection (d) of Sec. 53-109, R.C.M. 1947 would otherwise apply here, it has no application where the buyer of an automobile, the seller having failed to comply with the statute, has not rescinded the purchase of the Ford, especially as to a third party having no part in the contract of purchase. Where a buyer has accepted the benefits of a voidable contract for the purchase of a Ford, and has not acted to rescind the purchase, he should be held to be the owner as to those persons having no part in the contract.

The Questions Presented:

1. Do the punitive provisions of subsection (d) of *53-109, Revised Codes of Montana 1947,* apply to a title certificate of ownership of an automobile where the person named in the title certificate is dead, and the sole heir or successor in interest of the dead person has transferred for a consideration which has been fully paid all of her interest in the automobile to a third person?

2. May not the heir or successor in interest, who has sold her interest in an automobile, proceed to transfer title to the buyer under subsection (e) of 53-109, R.C.M. 1947, without regard to subsections (a), (b), and (c) of that statute?

3. Are not the facts of the present case, involving a contract for the purchase of an automobile which is still fully in effect, distinguishable from the facts in the Montana cases of *Sonnek* and *Safeco,* which referred to rescinded contracts of purchase?

4. Is not the buyer of an automobile under a contract which has not been rescinded by him the "owner" of the vehicle under the definition of "owner" in subsection (f), *Sec. 53-133, R.C.M. 1947,* particularly where the buyer has the sole and exclusive possession of the automobile?

5. Should not the term "owner" under the facts in this case, be understood in its popular and ordinary sense, under *Sec. 13-710, R.C.M. 1947?*

It is conceded in this case that Mrs. Robert McCormick, the sole heir and the administratrix of the estate of C. W. Ehart has been fully paid for the Ford; she makes no claim to the Ford; she has fully surrendered its use and possession to Albert Kinney.

It is also conceded that Albert Kinney has had the use and possession of the automobile; he has exercised complete dominion over it; he has had exclusive possession for two and one-third years prior to the accident; he licensed the vehicle so that he could use it for two years; he fully paid for it; he insured it as his vehicle for two years; and at no time has he taken any steps to rescind his contract of purchase of the Ford in any particular.

How then did the District Court conclude that as far as Albert Kinney was concerned the Ford was a non-owned automobile at the time of the fatal accident?

Appellant contends that the intent and function of the *Revised Codes of Montana 1947, Sec. 53-109* was misapprehended in the court below; that particularly subdivision (d) of that statute was not applicable to the case at bar; that the construction given the statute by the lower court makes the statute unworkable; that the difference between a void and voidable contract was not appreciated and applied in the case; and that the underlying *rationale* of the decided cases in the state court per-

taining to the statute was not properly applied to the case at bar.

The statute involved, *Sec. 53-109* is long and complex; yet a thorough study of it is necessary to a complete understanding of the case at bar. We have set forth the entire statute at length in the appendix to this brief, both for the convenience of the court and so that the statute can be read in its entire context. We will, however, be referring to portions of that statute in this argument from time to time.

A short statement relating to the transfer of auto titles in Montana is perhaps in order. When a person in Montana buys a new car from a dealer or indeed a used car, or buys a car from a registered owner, the seller is required to write his signature with pen and ink upon the "Certificate of Ownership" issued for the auto on the reverse of the certificate, before a Notary Public. Within ten days the buyer or transferee must then forward the Certificate of Ownership together with the Certificate of Registration to the Registrar of Motor Vehicles who files the same. The Registrar then issues a new Certificate of Ownership and Certificate of Registration. Liens, mortgages or other encumbrances are shown on the Certificate of Ownership.

The foregoing statement is covered under the provisions of *53-109,* subsections (a), (b), and (c). We should state at this point that the "Certificate of Owner-

ship" is actually the paper title to the automobile. It is the indicia of ownership in the State of Montana. The "Certificate of Registration" to which we have referred is provided for in *Sec. 53-107, R.C.M. 1947* and is a separate slip of paper upon which a person applies for an automobile license from year to year in the State of Montana. The "Certificate of Registration" is not to be confused with the "Certificate of Ownership" which is the subject of the statute in question in the case at bar, *53-109, R.C.M. 1947.*

As we have said, the first three subsections of *Sec. 53-109* apply in the ordinary case of transfer of title to an auto, and compliance with those subsections is enforced by a quite stern provision in subsection (d) of the same statute, which provides as follows:

> "Until said registrar shall have issued a certificate of registration and certificate of ownership and statement as hereinbefore provided, delivery of any motor vehicle shall be deemed not to have been made and title thereto shall not have passed and said intended transfer shall be incomplete and not be valid or effective for any purpose."
>
> *Revised Codes of Montana, 1947, Sec. 53-109 (d).*

The punitive effect of subsection (d), supra, has been applied in at least two Montana cases. They are as follows:

Sonnek v. Universal C.I.T. Credit Corporation, 374 P.2d 105, 108; 140 Mont. 503, 509.

Safeco Insurance Company of America v. Northwestern Mutual Insurance Company, 382 P.2d 174; 142 Montana 155.

In the *Sonnek* case, an automobile buyer brought an action in the Montana court to rescind the contract of purchase and a note and chattel mortgage executed by her in connection with the purchase on an automobile which she had bought from a dealer. She traded in a Chrysler automobile and paid some cash and executed a chattel mortgage to secure the balance of the purchase price. The mortgage form was prepared by Universal C.I.T. Credit Corporation and the mortgage was assigned to that corporation by the dealer.

The buyer had kept the automobile for a time, discovered that it was defective with a burned-out engine and took it back to the dealer. Upon this occasion the dealer agreed to take back the first car, sell her a second car, cancel the first mortgage on the first car, furnish 1959 license plates to the second car and transfer title to the second car to the buyer. The buyer surrendered possession of the first car and all papers in connection with this purchase. She executed a chattel mortgage on the second car for a purchase price which gave her credit for the down payment and the trade-in she had made. Once again the second mortgage was assigned to the credit corporation. She made some payments under the monthly installment requirement and on several occas-

sions demanded proper title papers for the second car. This title paper was never delivered to her.

As a result she was unable to obtain 1960 license plates for the second car and she discovered that the dealer did not cancel the mortgage on the first car. She thereupon notified the credit corporation by letter that she was rescinding the contract for the purchase of the second car and in her suit against the credit corporation and the dealer she demanded the return of what she had paid on the contract.

The credit corporation appeared in the action, claiming it was a holder in due course of the chattel mortgage, demanding the balance and the car or its value. The Montana court, in passing upon the case, held that there was a failure of consideration since the title did not pass to the buyer. It quoted subdivision (d) as we have set it forth above and held that since the provisions of *53-109* had not been complied with that title had not passed and there was no consideration for the note on which the chattel mortgage was based.

We point out specifically with respect to the *Sonnek* case that it did involve the ordinary purchase of an automobile by a buyer from a car dealer and the ordinary execution of chattel mortgages in connection with the purchase price. The dealer as seller did not comply with the provisions of *53-109 (a)*. Consequently she, as buyer, could not comply with the provisions of *53-109 (b)* under

which she was to surrender the certificate to the Registrar of Motor Vehicles. Clearly here the Montana court was correct in deciding that there was a failure of consideration in that the title had not passed to her, and that she was entitled to rescind the purchase agreement.

It is also an important fact in the *Sonnek* case that the *buyer did in fact rescind* the agreement prior to the court's decisions.

We turn our attention now to the second case, that of *Safeco v. Northwestern Mutual Insurance Company, supra.*

In the *Safeco case* it appeared that on May 9, 1960, one Harlan Dean, the owner of a Hillman automobile, drove to Bearpaw Motor Company and tried out a Studebaker automobile. A price of $350 plus the trade-in of the Hillman was discussed as the purchase price of the Studebaker. Harlan Dean left the Hillman with the dealer and drove away in the Studebaker, which he used in his work that day. On the following day, May 10, he told Bearpaw that he would take the Studebaker. He continued in possession of the Studebaker and on May 11 was involved in a serious accident.

No written agreements had been made in the Safeco case; the arrangements were all oral between Harlan Dean and Bearpaw Motor Company. The Certificate of Title to the Studebaker was never assigned by Bearpaw to Dean, nor was it ever delivered to him. In ad-

dition, there were no entries made in Bearpaw Motor Company's books as to whether a sale had been made, showing the price, the trade-in and the other pertinent data that would have gone into the records of the auto dealer. Moreover, Dean still kept the title to the Hillman automobile in his possession and it was never surrendered to the auto dealer. Subsequently Dean took the Hillman automobile back from the sales lot at Bearpaw and "the matter was at an end."

The *Safeco* case came to court because Safeco provided the liability insurance on the Hillman automobile and Northwestern Mutual Insurance Company provided liabiiity under a garage owner's policy for the car dealer. A declaratory judgment was sought to have it judicially determined which company was primarily responsible for the defense of Harlan Dean and any liability imposed upon him as a result of the collision in the Studebaker.

Here again, in the *Safeco* case, the Montana court looked at the provisions of *Sec. 53-109,* and particularly to the provisions of subsection (d) of that statute and decided that since there was not a compliance with *Sec. 53-109* therefore title had not passed and the transfer was incomplete and not valid for any purpose.

It is important for the purposes of our discussion in this brief to keep in mind that in *Safeco* we were again involved with an ordinary transaction with a buyer going to a car dealer and either not actually entering into a con-

tract, or if one was entered into *it was certainly rescinded* because the buyer took his automobile back and "the matter was at an end" *(382 P.2d 174, 177)*.

Probably the most important fact which differentiates the *Sonnek* and *Safeco* cases from the case at bar is that *Sonnek* and *Safeco* did actually involve the case of an ordinary transaction; but in this case, the case at bar, we have an entirely different situation. The owner of the paper title, the Certificate of Ownership, is C. W. Ehart, and he is dead.

The undisputed evidence here is that the Certificate of Ownership to the 1949 Ford was last listed under the name of C. W. Ehart (Stipulation, par. 3, Tr., Vol. I, p. 35). Moreover, his estate has not been fully probated, and no disposition of the Ford has been made in that estate; the last proceedings in the probate of the estate consisted of the filing of the Inventory and Appraisement which is a part of Exhibit 12 (Stipulation, par. 4, Tr., Vol. I, p. 35).

Does the fact that the owner named in the paper title is dead mean that the ownership of the Ford is suspended in some sort of legal limbo out of which it cannot be extracted? Not so; for the legislature has provided what should occur where the owner of the paper title dies and a transfer by operation of law has been effected. Subsection (e) of *53-109* provides in pertinent part:

"In the event of a transfer by operation of law of any title * * * of an owner of the legal title or owner in and to a motor vehicle registered under the provisions of this act, as upon inheritance, devise or bequest * * * the executor, administrator * * * or successor in interest of the person whose title or interest is so transferred shall forward to the Registrar of Motor Vehicles an application for registration in the form required for an original application of registration, together with a verified or certified statement of the transfer of such title or interest, which statement shall set forth the reason for such involuntary transfer, the title or interest so transferred, the name or names of the person or persons to whom such title or interest is to be transferred, the process of procedure effecting such transfer, and such other information as may be requested by the Registrar and with such statement shall be furnished such evidence and instruments as may otherwise be required by law to effect a transfer of legal or equitable title to or an interest in chattels as may be required in such cases, and in the event the registrar shall be satisfied that such transfer is regular and that all formalities as required by law have been complied with, he shall cause to be sent to the owner, conditional sales vendors, lessors, mortgagees and other lienors, as shown by his records, notice of such intended transfer and thereafter, but not less than five days thereafter, shall register such motor vehicle and shall issue a new Certificate of Ownership and Certificate of Registration to the person or persons entitled thereto * * *."

53-109 (e), R.C.M. 1947

Subsection (e), foregoing, by necessity provides the only means to transfer the paper title of an automobile where the owner named in the title paper has died before the transfer. Subdivision (e) is to be applied in those cases

not involving an ordinary transfer, as for example, a dealer to a buyer, or a live seller to a buyer, as these transfers are covered in subsections (a) and (b) of the statute.

Subsection (a) of the statute cannot apply in this case because subsection (a) requires that the owner named in the paper title sign the certificate with pen and ink. Obviously a dead person cannot comply with that provision.

We call attention particularly to those provisions in subdivision (e) of the statute, relating to transfers by operation of law, which provide that the executor, the administrator, *"or the successor in interest"* of the person whose title is transferred may forward to the registrar an application for registration.

We call attention to the fact that the application for registration is to be in the form required "for an original application of registration." Here again we have an important difference between the procedures provided under subsection (e) and those provided under subsections (a) and (b). In an ordinary transfer the certificate is merely forwarded with the endorsement thereon and a new title is issued (53-109 (a), (b), (c), R.C.M. 1947). But in an event such as this, where the owner named in the paper title is dead, an application of registration must be filed as for a brand new title. These provisions for application are found in *Sec. 53-106.1,*

R.C.M. 1947, but it is not important to set them forth here.

Subsection (e) of the statute, from its terms, would in this case allow the administratrix, Mrs. McCormick, or the buyer, Albert Kinney, as the "successor in interest" to make application for new title.

Moreover, the statute *does not require* in the event of a transfer by operation of law that the new title must be issued to the *direct successor of the transfer by operation of law*. Put another way, in this case subsection (e) does not require that application for a new title be made and that the only person who can get the new title is Mrs. Robert McCormick. That is not the purport of the statute. Rather, it is provided in subsection (e) that the statement accompanying the new application shall set forth (1) the reason for involuntary transfer; (2) the title transferred; (3) *the names of the persons to whom the title is to be transferred;* (4) *the process of procedure effecting such transfer;* (5) such instruments as may otherwise be required by law to effect a transfer of title and thereupon, (6) after proper notice to the parties the Registrar "shall issue a new Certificate of Ownership and Certificate of Registration *to the person or persons entitled thereto.*"

Under subsection (e) the power of the Registrar is not limited with respect to the transferee of the title. He can take into account "legal or equitable title," and upon

being furnished a statement as to whom the property is to be transferred must issue the certificate to that person. It is not necessarily the direct heir of the person who died. To read such a strict limitation into the provisions of subsection (e) is to put in the statute something that one does not find there from observation, taking it by its "four corners."

This point was completely missed by the District Court in construing the provisions of *Sec. 53-109*. That Court continued to believe that the transfer here had to occur under subsections (a), (b) and (c). In its "Discussion" in support of its Findings of Fact and Conclusions of Law the lower court stated that the "administrator of the estate, a Mrs. McCormick, should have taken proper steps under subsection (e) to obtain a certificate of ownership" but that the transfer from Mrs. McCormick "was a voluntary transfer governed by subsections (a), (b) and (d) of *Sec. 53-109*." In so stating, the court imposed a limitation upon subsection (e) that is not found in its language. The lower court did not take into account the words "successor in interest" which Albert Kinney certainly was.

In Montana, the construction of statutes is governed by the provisions of *Sec. 93-401-15, R.C.M. 1947*. That Section provides:

> *"Construction of statutes and instruments — general rule.* In the construction of a statute or instrument, the office of the judge is simply to ascertain

> and declare what is in terms or substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

In the construction of a statute, the intent of the legislature is to be given effect *(93-401-16, R.C.M. 1947)*. Moreover, in Montana, statutes and "all proceedings under them" are to be liberally construed with a view to effect their objects and to promote justice *(Sec. 12-202, R.C.M. 1947)*. Again, all of the provisions of the codes are to be construed "as though all such codes had been passed at the same moment of time, and were parts of the same statute" *(12-211, R.C.M. 1947)*.

Other code provisions which have a bearing and which ought to be taken into consideration in construing the provisions of *53-109* relate to the ownership of personal property. Some of those statutes are as follows (in all cases *Revised Codes of Montana, 1947*):

> "*67-201.* (6663) *Property — what constitutes.* The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this code the thing of which there may be ownership is called property."

> "*67-301.* (6673) *Owner.* All property has an owner, whether that owner is the state, and the property public; or the owner an individual, and the property private. The state may also hold property as a private proprietor."

"*67-303.* (6675) *Ownership — absolute or qualified.* The ownership of property is either:
(1) absolute; or
(2) qualified."

"*67-304.* (6676) *When absolute.* The ownership of property is absolute when a single person has the absolute domain over it, and may use it or dispose of it according to his pleasure, subject only to general laws."

"*67-305.* (6677) *When qualified.* The ownership of property is qualified:
(1) where it is shared with one or more persons;
(2) when the time of enjoyment is deferred or limited;
(3) when the use is restricted."

"*67-315.* (6685) *Present interest — to what entitles owner.* A present interest entitles the owner to an immediate possession of the property."

Construing the foregoing provisions with the provisions of 53-109, the title statute, it is certain that the 1949 Ford has to be owned by someone. "All property has an owner." It is obvious that the owner cannot be a dead person. Where a dead person is named on the title paper, his ownership transfers by operation of law, by bequest or inheritance. In this case his inheritance was to Robert McCormick. But Robert McCormick is also dead; he cannot be the owner. Mrs. McCormick is the "successor in interest" to the estate of Robert McCormick. She might be held to be the owner, but she has transferred her title, under the admitted facts in this case, to Albert Kinney, and has been fully paid for the transfer. It is obvious that in order to get the title

transferred the provisions of subsection (e) of *53-109* will have to prevail; it also ought to be obvious that the transfer can be effected to Albert Kiney under subsection (e) and a new certificate issued to him, without resort to the provisions of subsections (a), (b) and (c) of 53-109, the sections governing an ordinary transfer.

We turn our attention now to another important point in our presentation, the fact that the punitive provisions of subsection (d) of the statute do not apply to transactions under subsection (e) of the same statute.

Subsection (d) of the statute provides:

> "(d) Until said Registrar shall have issued a certificate of registration and certificate of ownership and statement, *as hereinbefore provided,* delivery of any motor vehicle shall be deemed not to have been made and title thereto shall not have passed and said intended transfer shall be incomplete and not be valid or effective for any purpose." (Emphasis ours)
>
> *R.C.M. 1947, Sec. 53-109 (d)*

By using the language "as hereinbefore provided" the legislature intends that the punitive effect of subsection (d) applies to transactions only under subsections (a), (b) and (c) of the same statute. And obviously because of the language "as hereinbefore provided," the punitive effect of the subsection does not apply to transfers which take place under subsection (e).

If it were not for the provisions of subsection (d), it would have to be admitted on all sides that there was in fact a completed contract of sale of personal property

in this case. Indeed the parties themselves thought so. Every aspect of a completed sale was present, unless the provisions of *Sec. 53-109 (d)* apply.

Sec. 67-1703, R.C.M. 1947, provides as follows:

> "67-1703. (6879) *Transfer of title under sale.* The title to personal property, sold or exchanged, passes to the buyer *whenever the parties agree upon a present transfer,* and the thing itself is identified, whether it is separated from other things or not." (Emphasis ours)

There is no doubt under the admitted facts in this case that as far as the parties themselves are concerned there had been a completed sale of the automobile.

Not only the grammatical reading of subsection (d), but also its history demonstrates that it was never intended that the provisions of subsection (d) should apply to procedures under subsection (e) of Section 53-109.

The first provision that we find in the Montana statutes relating to the registration of titles for motor vehicles is in the Session Laws of 1917. Under Chapter 75 of those Session Laws *(Laws of Montana, Fifteenth Session, 1917, Chapter 75)* the Secretary of State was constituted the Registrar of Motor Vehicles. Under Sec. 5 of that enactment owners were to file applications for registration. There was no provision in the act similar to subdivision (d) of the present 53-109.

The provisions of the 1917 enactment were carried into the 1921 Revised Codes of Montana and can be found distributed in three statutes with respect to regis-

tration, *Secs. 1757, 1758, and 1759* of the *Revised Codes of 1921.*

A substantial change in the provisions for registration of motor vehicles was enacted in the Session Laws of 1933 *(Laws of Montana, Twenty-third Session, 1933).* It is in this enactment that one first finds provisions similar to our present statute, and in fact, the enactment in 1933 constitutes the basis for the present statute. This enactment was Chapter 159 of the Session Laws of 1933 and the provisions with respect to transfer of title or interest are found in subdivision 3 of that enactment. This subdivision 3, with minor amendments later enacted, constitute the basis for the present provisions of *53-109, R.C.M. 1947.*

In looking at Subdivision 3 of Chapter 159 of the Session Laws of 1933, we find a subparagraph (a) requiring the "legal owner," that is the person whose title or interest is to be transferred, to write his signature with pen and ink upon the certificate of ownership. Subsection (b) provides within ten days thereafter the transferee shall forward the certificate to the registrar.

Subsection (c) provides that the provisions did not apply to the transfer of a motor vehicle to a dealer. Subsection (d) provided that the registrar upon receipt of a certificate of ownership properly endorsed would issue to the new owner a new certificate of registration and certificate.

It is in *subsection (e)* of *Chapter 159* of the *Session Laws of 1933* that we find the provisions that are important in this case.

That subsection provided:

> "(e) Until said registrar shall have issued said new certificate of registration and certificate of ownership, *as hereinbefore in subdivision (d) provided,* delivery of such vehicle shall be deemed not to have been made and the title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not valid or effective for any purpose." (Emphasis ours)

So it is clear that in the first enactment of this statute the provisions related specifically to subdivision (d) of the then enactment.

These provisions were carried into the *Revised Codes of Montana, 1935,* as *Sec. 1758.2.*

In 1943, in the Legislative Session of that year, this section was again amended *(Laws of Montana, Twenty-eighth Session, 1943, Chapter 148).* The principal effect of the amendment, as far as we are concerned, is that what had formerly been subdivisions (c) and (d) were combined in one section so that the new section (c) reads the same as the present (c) of Sec. 53-109 does now. It is important to note, however, that in the same enactment what was formerly subdivision (e) now became subdivision (d) and is as same as the present language in subsection (d) of 53-109. It is also important to note that in the 1943 enactment in subsection (d) the language "as hereinbefore provided" was continued.

Thus, the language of subsection (d) is now the same as it was enacted since 1943.

We point out, however, that in the 1933 enactment (Chapter 159, supra) where subdivision (e) said that the title was not effective unless the registrar issued a new certificate "as hereinbefore in subdivision (d) provided," the legislature also enacted subdivision (f) which is the same as the present subsection (e) of 53-109 relating to transfers by operation of law. The importance of this is that it shows the legislative intent that in those cases where there was a transfer by operation of law the provision that a transfer shall be deemed to be incomplete and not valid did not apply, by the terms of the specific statute. Again, in the 1943 amendment (Chapter 148, supra) when the former subdivisions (e) and (d) were combined, the language "as hereinbefore provided" was continued although the specific subsection was eliminated and immediately following the 1943 enactment is a provision with respect to transfers by operation of law. Again the intent of the legislature is clear: where transfers by operation of law are concerned, as in the case where the title is in an estate, there is no provision making transfers invalid in this situation and the legislature did not intend to make such transfers invalid where no certificate had been issued.

At the time of the transaction between Albert Kinney and Mrs. McCormick, she was a "successor in in-

terest" to the title which had transferred by operation of law, first to Robert McCormick, and then after his death to her. Therefore the correct procedure for her was outlined in subsection (e) of the statute and the punitive effect of subsection (d) does not apply.

When the lower court, in its "Discussion" (Tr., Vol. I, p. 64), states that the transfer by Mrs. McCormick to Kinney was a voluntary transfer governed by subsections (a), (b) and (c) of Sec. 53-109 it is asking for something that is presently unworkable. Mrs. McCormick is not a person who could transfer under the present provisions of 53-109 (a). She is not an "owner in or to a motor vehicle registered under the provisions of this act." The only provision of the registration statute which fits her situation is the provision in Sec. 53-109 (e) which would describe her as a "successor in interest of the person whose title or interest is so transferred." Therefore, any transfer by her is not subject to the punitive effect of subdivision (d) of the statute which relates only to transfers "as hereinbefore provided" and not to subsection (e).

What the Montana Court has stated in *State ex rel Hinz v. Moody, 71 Mont. 473, 481, 230 Pac. 575, 578 (1924),* has bearing here:

> "The function of the courts is to interpret the law; that is, not to add to or take from the law, but to give effect to the intent expressed in the law itself. 'The object of construction as applied to a writ-

ten constitution is to give effect to the intent of the people in adopting it. In the case of all written laws it is the intent of the lawgiver that is to be enforced. But this intent is to be found in the instrument itself. It is to be assumed that language has been employed with sufficient precision to convey it, and unless examination demonstrates that the presumption does not hold good in the particular case, nothing will remain except to enforce it. "Where law is plain, and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." Possible or even probable meanings, when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere.' 'Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing which we are to seek is the thought which it expresses. To ascertain this, the first resort in all cases is to the natural signification of the words employed, in the order of grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then that meaning, apparent on the face of the instrument, is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have a right to add to or take away from that meaning'. In interpreting clauses, we must presume that words have been employed in their natural and ordinary meaning (citing authorities).' Speaking in the same matter, Chief Justice Marshall says: The framers of the 'Constitution and the people who adopted it, must be understood to have employed words in their natural sense, and

to have intended what they have said (citing authority)'."

230 Pac., p. 578, 579.

The lower court apparently feels, from the language in its "Discussion" (Tr., Vol. I, p. 64) that in order to transfer the title here to Kinney, Mrs. McCormick, as administratrix of the estate, must first take steps under subsection (e) to obtain a certificate of ownership, presumably to Robert McCormick, since he is the person to whom the title transferred by operation of law upon the death of C. W. Ehart; then in the probate of the Robert McCormick estate take steps under subsection (e) to transfer the title to Mrs. McCormick as the sole heir of the decedent Robert McCormick; and then take steps under subsections (a), (b) and (c) of *53-109* as an ordinary voluntary transfer between herself and Mr. Kinney. We submit that this line of reasoning is an absurdity; that such procedures are not required; that it would result in an inordinate tie-up of the title to the Ford, and that the procedure outlined by statute under *53-109 (e)* can accomplish the transfer from the C. W. Ehart estate to Albert Kinney without tying up the title in two estates.

The holding of the lower court in its "Discussion" (supra) seems to be at variance with its discussion in its first Memorandum Opinion (Tr., Vol. I, p. 40) wherein the lower court, in deciding the first Motion for Summary Judgment, stated:

"Subsection (e) prescribes the procedure to be followed by an executor, administrator, and others acting in a representative capacity, 'in the event of a transfer by operation of law or any title or interest of an owner of the legal title or owner in and to a motor vehicle registered under the provisions of this act, as upon inheritance, devise or bequest * * *' "

In a footnote to the foregoing quoted provision from the Memorandum Opinion the court also stated:

"1. In view of this statutory provision *there is no reason why the title certificate could not have been endorsed and delivered to Kinney* prior to the completion of the Ehart and McCormick estates." (Emphasis ours)

(Tr., Vol. I, p. 40)

The lower court certainly was first under the impression that subsection (e) controlled the procedure to be followed in this case. We submit that the footnote in the first Memorandum Opinion correctly stated the possibilities under subsection (e) of the registration statute. If the procedure suggested in the footnote by the lower court had been followed, then by its terms, the punitive effect of subsection (d) would not apply since it has no relation to subsection (e).

In the foregoing portion of our brief we have been demonstrating that subsection (d) of the statute did not apply to the situation in the case at bar. But even if the provisions of subsection (d) did apply, the statute does not operate to make the contract of purchase between Albert Kinney and Mrs. McCormick void; rather what

existed between them was at most voidable if in fact subsection (d) did apply.

Albert Kinney never acted to rescind the contract in any particular for the purchase of the 1949 Ford. This fact is an important distinguishing feature that sets the case at bar apart from the factual situation in *Sonnek* and *Safeco*, in each of which cases there was an actual rescission of the agreement.

Subsection (d) does not purport to render the contract of purchase void. Rather it provides that if the certificate has not been issued the "title thereto shall not have passed and said intended transfer shall be incomplete and not be valid or effective for any purpose." *(Sec. 53-109 (d))* In the terms of the statute it is an incomplete contract. The distinction between a "void" contract and a "voidable" contract is set forth in *American Jurisprudence 2d:*

> "7. *Void, voidable, and unenforceable agreements.* There is an important distinction between "void" and "voidable" contracts, and confusion has resulted from the fact that a contract is sometimes said to be void when no more is intended than that it is voidable. A void contract is no contract at all; it binds no one and is a mere nullity. Accordingly, an action cannot be maintained for damages for its breach. No disaffirmance is required to avoid it, and it cannot be validated by ratification. A contract wholly void is void as to everybody whose rights would be affected by it if valid. Where one of two mutually dependent provisions of a contract is void, the parties are not bound by the other provision.

"A voidable contract, on the other hand, is valid and binding until it is avoided by the party entitled to avoid it. Furthermore, the defect therein may be cured by ratification by the party at whose instance it might have been avoided. The ratification may be express or implied — by express promise or by the conduct of the parties If a party desires to rely upon the invalidity of a voidable contract, he must disclaim it and refuse to permit anything to be done under it insofar as it concerns him. However, the party to be charged with ratification of such a contract must have acted voluntarily with full knowledge of the facts * * *."

17 Am. Jur. 2d, 342, 343, Sec. 7, Contracts.

In *Grady v. City of Livingston, (Mont., 1943) 115 Mont. 47, 56, 141 P.2d 346, 350,* our court stated that voidable contracts were not legally void and were not to be set aside or disregarded until they had been declared void by a court having jurisdiction. It further stated that a contract could be obviously void, but if the parties elect to proceed thereunder they may do so if no other parties are injured. It is conceded here that the parties elected to proceed under the contract even though it may have been voidable under the statute and certainly no third parties were injured by their so proceeding.

In *Parke v. Franciscus, (Calif. 1924) 228 Pac. 435, 439,* the California court construed a nearly identical statute to *Sec. 53-109 (d).* There the California court said:

"The provision in question declares that until the transfer of the 'ownership' in the car has received the original certificate of registration and has writ-

> ten his name upon the fact thereof in the blank space provided for that purpose by the department, the delivery of said motor vehicle shall be deemed not to have been made and title not to have passed, and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose. The provision does not make compliance therewith prima facie evidence of the ownership of the property in a car so registered and transferred, that is, the certificate of registration does not so declare it in terms. However, the words of the act are clear, plain and unambiguous and the meaning is not open to question. The failure of the transferee of the 'ownership' in the car to procure the registration certificate properly endorsed does not make the sale void ab initio, but in the terms of the statute it is incomplete. This interpretation of the intent of the legislature would seem to find support in the Motor Vehicle Act of 1923 * * *."

The holding in *Parke v. Franciscus* was concurred in *Kenney v. Christiansen, 253 Pac. 715, 717 (1924)* and in a long line of California cases where the rights of third parties were involved. The court has consistently protected such third parties although the original parties to the transaction have not complied with the registration requirements. See for example *Boles v. Stiles, 204 Pac. 848; Carpenter v. Devitt, 122 P.2d 79; Dennis v. Bank of America, Etc., 94 P.2d 51; Willard H. George, Ltd., v. Barnett, 150 P.2d 591; Henry v. General Forming, Ltd., 200 P.2d 785.*

By implication, the Montana Supreme Court has also found that in situations where the title statute has not been complied with, there is an incomplete contract,

or a voidable one, rather than one void ab initio. This is apparent from the *rationale* of the court set forth in the *Safeco* case in which the Montana Court said (332 P.2d 174, 179):

> "* * * In any regular transaction the new certificate of ownership is required to be issued by the registrar and issues as a matter of course. *The transer then becomes complete and valid and dates back to the time of the transfer between the parties.* If the transfer has not been made in compliance with the statute and the registrar by reason thereof does not issue a new certificate of ownership, clearly there was no transfer of ownership in its inception." (Emphasis ours)

This language of the Montana Court in *Safeco* shows that the Montana Supreme Court does not regard the sale as void as a matter of fact, *ipso facto*. Rather, the situation is one of a voidable contract. Until one of the parties entitled to so act moves to set aside the voidable contract, the contract is binding as between the parties *(Grady v. City of Livingston, 115 Mont. 47, 56; 141 P.2d 346, 350)*.

The difference between a void and a voidable contract is important in considering the decision of the late Judge Pray in Montana in *Firemen's Insurance Company of Newark, New Jersey, vs. Show, 110 F. Supp. 523*. In this case, decided before the *Sonnek* and *Safeco* cases, Judge Pray had before him a situation where Jerry Show bought a truck and took delivery of it on December 5 or 6 of 1950. Application was made to the Registrar

of Motor Vehicles for a certificate of title in his name and eventually it was received from the Registrar on December 20, 1950. In the meantime, on December 17, 1950, before the certificate of title had been issued, the truck was involved in an accident. The insurance company contended that because the certificate of title had not been issued on the date of the accident the seller, Perry Motors, was still the owner of the truck under *Sec. 53-109(d),* and the insurance policy on Show never became effective. Judge Pray summarily disposed of this contention (110 F. Supp., p. 523) and pointed out that the insurance contract had been executed on November 29, 1950, and was in effect during the time that the application had been made for the certificate of title; and to hold for the insurance company in that instance would result in an option to the insurer to claim an alleged voidness or invalidity which would raise a cloud on every policy of automobile liability insurance. He rejected the contention as without merit.

Judge Pray's decision *on a contract fully in force* was cited to the Montana Court in the *Safeco* case, as the lower court noted, and it was not overruled specifically or by implication. Rather *Safeco* and the *Firemen's Insurance Company* case confirm what we contend, that involved here is a voidable contract rather than a void contract and that as between the parties Albert Kinney and Mrs. McCormick, Albert Kinney was the owner of

the automobile and would continue to be the owner until such time as he took steps to rescind the contract.

In this connection it should be noted that Albert Kinney did in fact demand that the title certificate be delivered to him. He made request for the title on four or five occasions after the purchase up to the time of the fatal accident.

The appellant insurance company, of course, had no part in the proceedings relating to the procurement of the certificate of title. This was entirely between Albert Kinney and Mrs. McCormick. Yet it is being penalized, under the decision of the lower court, for the inaction of the parties in obtaining the certificate of title. This was frowned upon by this Circuit Court in *Yoshida v. Liberty Mutual Insurance Company, 240 F.2d 824, 828.* Indeed, this court pointed out in that case something that is true in this case, that in the construction of contracts, including insurance policies, the provisions of a California statute, which are identical to a Montana statute, should be considered. The Montana statute is *Sec. 13-710, R.C.M. 1947,* which provides as follows:

> "13-710. (7535) *Words to be understood in usual sense.* The words of a contract are to be understood in their ordinary and popular sense, *rather than according to their strict legal meaning,* unless used by the parties in a technical sense or unless a special meaning is given to them by usage, in which case the latter must be followed." (Emphasis ours)

It also provided in *Sec. 53-133, R.C.M. 1947* that

the definition of an "owner" of a motor vehicle is "any person, firm, association or corporation owning or renting a motor vehicle, or having the exclusive use thereof, under lease or otherwise, and shall also include a contract vendee."

We have here a case where the Montana Supreme Court has not spoken on the precise facts here in dispute. It has not had before it a situation where the title was vested in an estate, and has had no chance to speak out as to what the proper procedure should be.

Under *Erie Railroad Company v. Tompkins, 58 S. Ct. 817, 304 U.S. 64, 82 L. Ed. 1188* a decision of the state court on the precise point in controversy is binding on the federal court.

Where the state court has not passed specifically on the question, or where a direct expression by the state court is lacking, then the federal court may have regard for any persuasive data available, such as compelling inferences or logical implications or other related adjudications and applicable statutes. Moreover, the federal court may resort to the rationale of the rule laid down by the state court in its decided cases which approach the question (*Spilberger v. Textron, Inc. (C.A., New York) 172 F.2d 85).* Indeed under *West v. American Tel. & Tel. Company, 311 U.S. 223, 61 S. Ct. 179, 85 L.Ed. 139,* federal courts, in cases such as this where the state court has not pronounced on the precise subject,

should ascertain from all other available data what the state law is, and apply that law.

> "* * * In other words this court must endeavor to ascertain what decision the Montana Supreme Court would reach were the question presented to it."
>
> *Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71, 72 (U.S.D.C., Mont., 1961)*

Thus far the Montana Court has not passed upon the question of ownership under an unrescinded contract for purchase of an automobile; it has not passed upon the bearing of the definition of "owner" found in *Sec. 59-133, R.C.M. 1947*; it has not passed upon the procedure for obtaining certificate of title under subsection (e) of *53-109, R.C.M. 1947.*

F. *CONCLUSION*

Once in a speech before a bar meeting, a member of this court stated that the function of an appellate court is "to make sure that the right party wins the lawsuit."

Here is a case where the buyer of an automobile took possession of the automobile, exercised complete dominion over it for two and a third years until the fatal accident, has never surrendered it, caused it to be licensed for two years, insured it as his own for two years, paid for it, and "figured it was his." Yet, he has been held here not to be the "owner" of the automobile.

Such a decision is incongruous and manifestly unjust, and we ask reversal by this court.

Dated, Billings, Montana,
January 21, 1966.

Respectfully submitted,

WIGGENHORN, HUTTON,
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By JOHN C. SHEEHY
Attorneys for Appellant

CERTIFICATE

John C. Sheehy, an attorney duly authorized to practice in the United States Court of Appeals for the Ninth Circuit states as follows:

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

JOHN C. SHEEHY
Attorney for appellant

ACKNOWLEDGEMENT OF SERVICE

Due service of the within and foregoing Brief of Appellant, and receipt of 3 copies thereof, made and admitted this 21st day of January, 1966.

CROWLEY, KILBOURNE, HAUGHEY, HANSON & GALLAGHER

By LOUIS R. MOORE
Attorneys for Appellee

APPENDIX

1. *Full text of Sec. 53-109, R.C.M. 1947:*

"53-109. (1758.2) *Transfer of title or interest.* (a) Upon a transfer of any title or interest of an owner or owner in or to a motor vehicle registered under the provisions of this act as hereinbefore required, the person or persons whose title or interest is to be transferred shall write their signatures with pen and ink upon the certificate of ownership issued for such vehicle, in the appropriate space provided upon the reverse side of such certificate, and such signature shall be acknowledged before a notary public.

(b) Within ten (10) days thereafter, the transferee shall forward both the certificate of ownership so endorsed and the certificate of registration together with the information required under section 53-107, to the registrar, who shall file the same upon receipt thereof, and no certificate of ownership and certificate of registration shall be issued by the registrar of motor vehicles until the outstanding certificates are surrendered to that office or their loss established to his reasonable satisfaction.

(c) The provisions of subdivision (b) of this section, requiring transferee to forward the certificate of ownership after endorsement and the certificate of registration to the registrar, shall not apply in the event of the transfer of a motor vehicle to a duly licensed automobile dealer intending to resell such vehicle and who operates the same only for demonstration purposes, but every such dealer shall upon transferring such interest deliver such certificate of ownership and certificate of registration with an application for registration executed by the new owner in accordance with the provisions of section 53-107, and the registrar upon receipt of said certificate of ownership, certificate of registration and application for registration, together with the conditional sales contract or other lien, if any, shall issue a new certificate of ownership and certificate of registration together with a statement of any conditional sales contract, mortgage, or other lien as provided in said section 53-107.

(d) Until said registrar shall have issued a certificate of registration and certificate of ownership and statement as hereinbefore provided, delivery of any motor vehicle shall be deemed not to have been made and title thereto shall not have passed and said intended transfer shall be incomplete and not be valid or effective for any purpose.

(e) In the event of a transfer by operation of law of any title or interest of an owner of the legal title or owner in and to a motor vehicle registered under the provisions of this act, as upon inheritance, devise or bequest, order in bankruptcy or insolvency, execution sale, repossession contract, or otherwise than by voluntary act of the person whose title or interest is so transferred, the executor, administrator, receiver, trustee, sheriff or other representative, or successor in interest of the person whose title or interest is so transferred shall forward to the registrar of motor vehicles an application for registration in the form required for an original application for registration, together with a verified or certified statement of the transfer of such title or interest which statement shall set forth the name or names of the person or persons to whom such title or interest is to be transferred, the process of procedure effecting such transfer and such other information as may be requested by the registrar and with such statement shall be furnished such evidence and instruments as may otherwise be required by law to effect a transfer of legal or equitable title to or an interest in chattels as may be required in such cases, and in the event the registrar shall be satisfied that such transfer is regular and that all formalities as required by law have been complied with, he shall cause to be sent to the owner, conditional sales vendors, lessors, mortgagees and other lienors, as shown by his records notice of such intended transfer and thereafter, but not less than five (5) days thereafter, shall register such motor vehicle and shall issue a new certificate of ownership and certificate of registration to the person or persons entitled thereto. The notice herein required shall be deemed complied with by deposit in the post office in Deer Lodge, Montana, such notice,

postage prepaid, addressed to such person or persons at the respective addresses shown on his records.

In the event of the death of an owner of one or more motor vehicles and/or trailer, and/or semitrailer, and/or trailer-house registered hereunder and not exceeding the value of one thousand dollars ($1,000.00), without leaving other property necessitating the procuring of letter of administration or letters testamentary then the surviving husband or wife, or other heir, unless such property is by will otherwise bequeathed, may secure transfer of the certificate of ownership and the certificate of registration of the deceased, in and to such motor vehicle in the name of the surviving husband or wife or other heir, as above mentioned, upon filing with the registrar an affidavit of such person setting forth the fact of survivorship and the name and address of any other heirs and such other facts as are hereby made necessary to entitle the affiant to a transfer and therupon the registrar is authorized to make such transfer of the certificate of ownership and certificate of registration, subject to all contracts, leases, mortgages, or other liens as shown by his records.

Nothing in the foregoing subdivision of this section shall prevent any conditional sales vendor, mortgagee, or other lienor from assigning his interest or title in or to a motor vehicle registered under the provisions of this act to any other person without the consent of and without effecting the interest of the holder of the certificate of ownership and certificate of registration. Upon any conditional sales vendor, mortgagee, or other lienor assigning his interest in any motor vehicle registered under this act a copy of such assignment must be filed with the registrar and record thereof made upon his records.

(f) Every person who transfers any motor vehicle to a junk dealer for the purpose of scrapping said vehicle shall so notify the registrar and deliver the certificate of ownership and certificate of registration to the registrar for cancellation."

Revised Codes of Montana, 1947,
Sec. 53-109.

2. *List of Exhibits:*

Plaintiff's (Appellee's) Exhibits:

1. Insurance policy No. A24-030,461; Intl. 12/58 to 6/59.
2. Insurance policy No. A24-107; 394; Dodge 9/59 to 3/60.
3. Assignment
4. Ratification of assignment.
5. Dodge period coverage.
6. Intl. period coverage.
7. 1955 Ford application.
8. Dodge application.
9. Intl. application.
10. Certificate of title and letter.

Defendant's (Appellant's) Exhibits:

11. Copy of policy coverage.
12. Probate photostats.
13. 1949 Ford application
14. Colbrese v. Kinney court file.
15. Copy of Stipulation.

All admitted by stipulation at pretrial conference.